

UNITED STATES COURT OF APPEALS January 5, 2012

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

MIKE KASSABJI,

Movant.

No. 11-2238
(D.C. No. 1:09-CV-00675-RB-CG)
(D. N.M.)

ORDER

Before **O'BRIEN**, **HOLMES**, and **MATHESON**, Circuit Judges.

Movant Mike Kassabji, a New Mexico state prisoner proceeding pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition seeking to challenge his 2007 convictions.

Mr. Kassabji was convicted in New Mexico on over 100 counts of animal cruelty. He was sentenced to eleven years' imprisonment. He filed a § 2254 petition challenging these convictions in July 2009. Adopting the magistrate judge's report and recommendation, the district court dismissed that petition with prejudice on procedural default grounds. *Kassabji v. Janecka*, No. 09-cv-00675-RB-CG (D. N.M. May 13, 2010) (unpublished order). His appeal was dismissed based on his failure to object to the magistrate judge's report and recommendation. *Kassabji v. Janecka*, No. 10-2140 (10th Cir. Sept. 1, 2010) (unpublished order).

Before a state prisoner may file a second or successive § 2254 petition, the prisoner must first “move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C.

§ 2244(b)(3)(A). To obtain permission to file a second or successive § 2254 petition, a movant must show that he has not raised his claim in a previous habeas application, *id.* § 2244(b)(1) and (2), and that his new claim either “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” *id.* § 2244(b)(2)(A), or depends on facts, previously undiscoverable through the exercise of due diligence, that “if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty,” *id.* § 2244(b)(2)(B).


In his motion for authorization, Mr. Kassabji argues, as he did in his prior § 2254 petition, that there is no law that supports imprisoning him for any length of time on charges of animal cruelty. We may not authorize this claim because he raised it in his prior § 2254 petition. *See id.* § 2244(b)(1) and (2); *see also Gonzalez v. Crosby*, 545 U.S. 524, 529-30 (2005) (“[A]ny claim that has already been adjudicated in a previous petition must be dismissed.”).

Mr. Kassabji also seeks to present a claim that he should have been released from prison on probation three years after his conviction. He asserts this

claim is based on newly-discovered evidence in as much as more than three years passed but he has not yet been released on probation. A challenge to the execution of a particular sentence, however, is properly brought under 28 U.S.C. § 2241. *Davis v. Roberts*, 425 F.3d 830, 833 (10th Cir. 2005). Issues concerning “parole procedure[] go to the execution of sentence and, thus, should be brought against defendant’s custodian under 28 U.S.C. § 2241.” *United States v. Furman*, 112 F.3d 435, 438 (10th Cir. 1997). Mr. Kassabji’s claim that he should have been released on probation is a parole-based challenge to the execution of his sentence. Thus, relief under § 2254 is not the appropriate forum.

Accordingly, we DENY Mr. Kassabji authorization to file his proposed second or successive § 2254 petition. This denial of authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish line.

ELISABETH A. SHUMAKER, Clerk